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### Codifying the Obligations of States Relating to the Prevention of Atrocities

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KEYNOTE SPEECH FOR CONFERENCE ON  
“ATROCITY PREVENTION: THE ROLE OF  
INTERNATIONAL LAW AND JUSTICE”  
CASE WESTERN RESERVE UNIVERSITY SCHOOL  
OF LAW  
SEPTEMBER 20, 2019

CODIFYING THE OBLIGATIONS OF  
STATES RELATING TO THE  
PREVENTION OF ATROCITIES

*Sean D. Murphy<sup>1</sup>*

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## I. INTRODUCTION

Many thanks, Dean Scharf, for that warm introduction and for the invitation to serve as the keynote speaker at this very important conference on atrocity prevention. You have assembled here an extraordinary group of speakers and participants, on a topic that is very timely, when we consider what is happening in places such as Myanmar, North Korea, Syria, Venezuela, or – as our third panel today will discuss – Yemen.

Indeed, I am very pleased, in my capacity as President of the American Society of International Law, for the Society to be co-sponsoring this event, given that one of the Society's two "signature topics" concerns atrocity prevention.<sup>2</sup> Todd Buchwald, who is here, serves as the chair of the steering committee for that topic, and you, Dean Scharf, are a member of that committee, with both of you bringing to bear deep backgrounds and expertise in this area.

I am further pleased that this conference provides an opportunity to discuss the International Law Commission's 2019 Articles on Prevention and Punishment of Crimes against Humanity (2019 CAH Articles), which is the subject of our fourth panel. Those Articles were just adopted by the Commission last month in Geneva, and have now been sent to the U.N. General Assembly for its consideration this fall.<sup>3</sup> So, it is quite timely to discuss what they say about atrocity prevention and whether they should serve as the basis for a Convention on the Prevention and Punishment of Crimes against Humanity.

I have titled this keynote address "Codifying the Obligations of States Relating to the Prevention of Atrocities." In addressing this topic, I am not going to focus on the functioning of international institutions, such as the U.N. Security Council (to be discussed by panel 1) or the International Criminal Court (to be discussed by panel 5). Rather, my focus is on international obligations embedded in major multilateral treaties that address the issue of prevention, either expressly or implicitly. In doing so, I will attempt to connect the past to the present, so as to highlight six obligations of States relating to prevention that the Commission deemed essential for inclusion in its

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2. *See Atrocity Prevention: The Role of International Law and Justice*, AM. SOC'Y OF INT'L L., <https://www.asil.org/topics/signaturetopics/atrocity-prevention> [<https://perma.cc/NF58-JNX3>].

3. The 2019 CAH Articles, with commentary, may be found in the U.N. International Law Commission's 2019 Annual Report. *See* Report of the International Law Commission on the Work of Its Seventy-first Session, U.N. Doc A/74/10, at 11–140 (2019) [hereinafter CAH Articles]. For the 2019 CAH Articles, see *id.* at 11–21. For the 2019 CAH Articles with commentary, see *id.* at 22–140.

2019 CAH Articles. Before doing that, however, allow me to say a few words about the current framework of major multilateral treaties that contain provisions on prevention of crimes or human rights violations, beginning with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (1948 Genocide Convention).<sup>4</sup>

## II. CODIFYING THE PREVENTION OF ATROCITIES OR OTHER WRONGS: TREATIES FROM 1948 TO 2019

An early significant example of an obligation of prevention may be found in the 1948

Genocide Convention, which contains three provisions that speak to issues of preventing that particular atrocity.<sup>5</sup>

●Article I provides: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”<sup>6</sup>

●Article V provides: “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.”<sup>7</sup>

●Article VIII provides: “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.”<sup>8</sup>

Thus, the 1948 Genocide Convention contains important elements relating to prevention: a general obligation to prevent genocide; an obligation to enact national measures to give effect to the provisions of the Convention;<sup>9</sup> and a provision for States parties to call upon the

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4. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

5. *See id.*

6. *Id.* at 280.

7. *Id.*

8. *Id.* at 282.

9. *See id.* at 280–82.

competent organs of the United Nations to act for the prevention of genocide.<sup>10</sup>

Such types of preventive obligations thereafter featured in most multilateral treaties addressing crimes, certainly at least since the early 1970's.<sup>11</sup> Examples include: the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;<sup>12</sup> the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;<sup>13</sup> the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid;<sup>14</sup> the 1979 International Convention against the Taking of Hostages;<sup>15</sup> the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984 Torture Convention);<sup>16</sup> the 1985 Inter-American Convention to Prevent and

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10. Genocide Convention, *supra* note 4, at 282.
  11. *See generally Multilateral Treaties Deposited with the Secretary General*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/Content.aspx?path=DB/titles/page1\\_en.xml](https://treaties.un.org/Pages/Content.aspx?path=DB/titles/page1_en.xml) [<https://perma.cc/8PWW-BA68>] (providing a link to a list of multilateral treaties deposited with the UN Secretary General).
  12. *See* Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 10, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (“Contracting States shall, in accordance with international and national law, endeavour to take all practicable measure[s] for the purpose of preventing the offences mentioned in Article 1.”).
  13. *See* Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 4, Dec. 14, 1973, 28.2 U.S.T. 1975, 1035 U.N.T.S. 167 (“States Parties shall cooperate in the prevention of the crimes set forth in article 2, particularly by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories.”).
  14. *See* International Convention on the Suppression and Punishment of Crime of Apartheid art. 4, Nov. 30 1973, 1015 U.N.T.S. 243 (“The States Parties to the present Convention undertake . . . (a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime.”).
  15. *See* International Convention against the Taking of Hostages art. 4, Dec. 17, 1979, 1316 U.N.T.S. 205 (“States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of . . . offences . . . including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages.”).
  16. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (“Each State Party shall take

Punish Torture;<sup>17</sup> the 1994 Inter-American Convention on the Forced Disappearance of Persons;<sup>18</sup> the 1994 Convention on the Safety of United Nations and Associated Personnel;<sup>19</sup> the 1997 International Convention on the Suppression of Terrorist Bombings;<sup>20</sup> the 2000 United Nations Convention against Transnational Organized Crime;<sup>21</sup>

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effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”).

17. *See* Inter-America Convention to Prevention and Punish Torture art. 1, Mar. 28, 1996, O.A.S.T.S. No. 67 (“The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.”); *see also id.* art. 6 (“The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.”).
18. *See* Inter-American Convention on Forced Disappearance of Persons art. 1, Mar. 28, 1996, O.A.S.T.S. No. 68, 33 I.L.M. 1429 (“The States Parties to this Convention undertake . . . (c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; (d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.”).
19. *See* Convention on the Safety of United Nations and Associated Personnel art. 11, Dec. 9, 1994, 2051 U.N.T.S. 363 (“States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.”).
20. *See* International Convention for the Suppression of Terrorist Bombings art. 15, Dec. 15, 1997, 2149 U.N.T.S. 256 (“States Parties shall cooperate in the prevention of the offences set forth in article 2.”).
21. *See* United Nations Convention against Transnational Organized Crime art. 9, 2225 U.N.T.S. 209 (“In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.”) [hereinafter Transnational Organized Crime Convention]; *see also id.* art. 9, ¶ 2 (“Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions”); *id.* art. 29, ¶ 1 (“Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention.”); *id.* art. 31, ¶ 1 (“States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime.”).

the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;<sup>22</sup> the 2000 Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime;<sup>23</sup> the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime;<sup>24</sup> the 2002 Optional Protocol to the

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22. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children art. 9, Nov. 15, 2000, 2237 U.N.T.S. 319 (supplementing the Transnational Organized Crime Convention and stating “[s]tates Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization”).
23. *See* Protocol against the Smuggling of Migrants by Land, Sea and Air art. 11, 2241 U.N.T.S. 480 (“Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.”) [hereinafter Protocol against the Smuggling of Migrants]; *see also id.* art. 11 (“Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.”); *id.* art. 14, ¶ 1 (“States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol.”).
24. *See* Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition art. 9, May 31, 2001, 2326 U.N.T.S. 208 (“A State Party that does not recognize a deactivated firearm as a firearm in accordance with its domestic law shall take the necessary measures, including the establishment of specific offences if appropriate, to prevent the illicit reactivation of deactivated firearms.”) [hereinafter Protocol against the Illicit Manufacturing and Trafficking in Firearms]; *see also id.* art. 11 (“In an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition, each State Party shall take appropriate measures: (a) To require the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through its territory; and (b) To increase the effectiveness of import, export and transit controls, including, where appropriate, border controls, and of police and customs transborder cooperation.”); *id.* art. 14 (“States Parties shall cooperate with each other and with relevant international organizations, as appropriate, so that States Parties may receive, upon request, the training and technical assistance necessary to enhance their ability to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms.”).

1984 Torture Convention;<sup>25</sup> the 2003 United Nations Convention against Corruption;<sup>26</sup> and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (2006 Enforced Disappearance Convention).<sup>27</sup>

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25. *See* Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, preamble, Dec. 18 2002, 2375 U.N.T.S. 237 (recalling that “the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures”) [hereinafter *Optional Protocol to the Convention against Torture*]; *see also id.* art. 3 (“Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.”).
26. *See* United Nations Convention against Corruption art. 6, Dec.14, 2005, 2349 U.N.T.S. 41 (“Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption.”) [hereinafter *Convention against Corruption*]; *see also id.* art. 9 (“Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.”); *id.* art. 12 (“Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.”).
27. *See* International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 23, 2010, 2716 U.N.T.S. 3 (stating that the parties are “[d]etermined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance”) [hereinafter *Convention for the Protection from Enforced Disappearance*]; *see also id.* art. 23 (“Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized . . . Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished . . . Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.”).



Some multilateral human rights treaties, even though they are not focused on the prevention of crimes as such, contain obligations to prevent or suppress human rights violations. Examples include: the 1966 International Convention on the Elimination of All Forms of Racial Discrimination;<sup>28</sup> the 1979 Convention on the Elimination of All Forms of Discrimination against Women;<sup>29</sup> and the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.<sup>30</sup> Some multilateral human rights treaties do not refer expressly to “prevention”, “suppression,” or “elimination” of the act but, rather, focus on an obligation to take appropriate legislative, administrative, and other measures to “give effect” to or to “implement” the treaty,<sup>31</sup> which may be seen as

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28. *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 3, Mar. 7, 1966, 660 U.N.T.S. 195 (“States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”).
29. *See* Convention on the Elimination of All Forms of Discrimination against Women art. 2, Dec.18, 1979, 1249 U.N.T.S. 13 (“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”) [hereinafter Convention Eliminating Discrimination Against Women]; *see also id.* art. 3 (“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”).
30. *See* Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence art. 2, C.E.T.S. 210 (“Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the use of sanctions, where appropriate; abolishing laws and practices which discriminate against women.”).
31. *See* International Covenant on Civil and Political Rights art. 2, Mar. 23, 1976, 999 U.N.T.S. 171 (“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”) [hereinafter Covenant on Civil and Political Rights]; *see also* Convention on the Rights of the Child art. 4, Nov. 20, 1989, 1577 U.N.T.S. 3 (“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”) [hereinafter Convention of the Rights of the Child].

encompassing necessary or appropriate measures to prevent the act. Examples include the 1966 International Covenant on Civil and Political Rights<sup>32</sup> and the 1989 Convention on the Rights of the Child.<sup>33</sup>

As the above demonstrates, there exists a framework of treaties, some with extremely high levels of adherence by States, containing provisions on the prevention of crimes or human rights violations, that may be drawn upon when considering the obligations of States to prevent atrocities. The U.N. International Law Commission's 2019 CAH Articles drew upon these prior treaties to craft its own provisions on prevention of crimes against humanity.<sup>34</sup> In doing so, six essential obligations emerged, which I will discuss in turn.

### III. SIX OBLIGATIONS OF STATES RELATING TO PREVENTION OF ATROCITIES

Exactly what types of obligations of States fall within the realm of "prevention" might be debated; it could generally be thought that some obligations are directly connected to prevention (obligations *of* prevention) while others are of a different nature, though bearing upon the issue of prevention (obligations *relating to* prevention). The distinction may not be of any great significance, and for present purposes I will simply characterize the following six obligations of States as all relating, directly or indirectly, to prevention atrocities.

#### A. *Obligation #1: States Shall Not Themselves Commit Acts of Atrocities*

The first obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall not itself commit acts that constitute crimes against humanity.<sup>35</sup> This may seem an especially obvious way of preventing such atrocities, which may explain why it is typically viewed as *implicitly* present in existing treaties, while not explicitly stated.

Such an obligation "not to engage in acts" was viewed by the Commission as containing two components.<sup>36</sup> The first component is that States have an obligation not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international

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32. Covenant on Civil and Political Rights, *supra* note 31, art. 2, ¶ 2.

33. Convention on the Rights of the Child, *supra* note 31, art. 4.

34. *See generally* CAH Articles, *supra* note 3.

35. *See* CAH Articles, *supra* note 3, at 13.

36. *Id.* at 48.

law.”<sup>37</sup> In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice found that the identification of genocide as a crime, as well as the obligation of a State to prevent genocide, necessarily implies an obligation of the State not to commit genocide.<sup>38</sup> It stated:

Under Article I the States parties are bound to prevent such an act, which it describes as ‘a crime under international law’, being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as ‘a crime under international law’: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. . . . In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.<sup>39</sup>

The second component of this obligation “not to engage in acts” is that States have obligations under international law not to aid or assist, or to direct, control or coerce, another State in the commission of an internationally wrongful act.<sup>40</sup>

Importantly, the Court also decided that the substantive obligation reflected in Article I was not, on its face, limited by territory but, rather, applied “to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations [...] in question.”<sup>41</sup> Further, while much of the focus of that Convention is on prosecuting individuals for the crime of genocide,<sup>42</sup> the Court stressed that the breach of the obligation not to commit genocide is not a *criminal* violation by the State but, rather, concerns a breach of international

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37. *Id.* at 48–53. For analysis of the obligation of prevention in the case, see Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment*, 18 E.J.I.L. 695 (2007).

38. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, 113 (Feb. 26).

39. *Id.*

40. *Id.* at 217.

41. *Id.* at 120.

42. *See generally* Genocide Convention, *supra* note 4.

law that engages State responsibility.<sup>43</sup> The Court's approach is consistent with views previously expressed by the Commission,<sup>44</sup> including in the commentary to the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>45</sup> There, the Commission stated: "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them."<sup>46</sup> Thus, a breach of the obligation not to commit genocide engages the responsibility of the State if the conduct at issue is attributable to the State pursuant to the rules on the responsibility of States for internationally wrongful acts.<sup>47</sup> Indeed, in the context of disputes that may arise under the 1948 Genocide Convention, Article IX refers, *inter alia*, to disputes "relating to the responsibility of a State for genocide".<sup>48</sup>

While such an obligation not to commit the acts in question is implicit in many existing multilateral treaties on crimes or human rights, the International Law Commission viewed it as important to express such an obligation explicitly in the 2019 CAH Articles.<sup>49</sup> Consequently, Article 3, paragraph 1, provides: "Each State has the obligation not to engage in acts that constitute crimes against humanity."<sup>50</sup>

*B. Obligation #2: States Undertake Generally to Prevent Atrocities*

The second obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall undertake generally to prevent crimes against humanity.<sup>51</sup> This obligation is expressed at a very general level; as such, it may be seen as an umbrella obligation of prevention, one aspect of which relates

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43. *Bosn. & Herz. v. Serb. & Montenegro*, 2007 I.C.J. at 114. (noting that international responsibility is "quite different in nature from criminal responsibility").

44. *Yearbook of the U.N. International Law Commission 1998*, vol. II (Part Two), U.N. Doc. A/CN.4/SER.A/1998/Add.1, at 65 (1998) (finding that the Convention on the Prevention and Punishment of the Crime of Genocide "did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility").

45. *Yearbook of the U.N. International Law Commission 2001*, vol. II (Part Two), U.N. Doc. A/CN.4/SER.A/2001/Add.1, at 142 (2001) (providing commentary to art. 58 of the draft articles on responsibility of States for internationally wrongful acts).

46. *Id.*

47. *Id.*

48. Genocide Convention, *supra* note 4, art. IX.

49. CAH Articles, *supra* note 3, at 48.

50. *Id.* at 13, art. 3(1).

51. *Id.* at 13, art. 4.

to the State's exercise of influence with persons or groups that are not directly under its authority.

Thus, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice considered the meaning of the express wording of article I of the 1948 Genocide Convention that parties "undertake to . . . prevent" genocide.<sup>52</sup> It stated:

That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III.<sup>53</sup>

The Court went on to explain that a State party to the Genocide Convention is expected to use its best efforts (a due diligence standard) when it has a "capacity to influence effectively the action of persons likely to commit, or already committing" the acts, which in turn depends on the State party's geographic, political and other links to the persons or groups at issue.<sup>54</sup> At the same time, the Court found that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed."<sup>55</sup> Hence, this second obligation *inter alia* requires that a State exercise due diligence to prevent persons or groups not directly under its authority, but with whom it has influence, from committing crimes against humanity.

To capture this second obligation for the 2019 CAH Articles, the Commission first adopted Article 3, paragraph 2.<sup>56</sup> That paragraph reads in part: "Each State undertakes to prevent ... crimes against humanity, which are crimes under international law, whether or not

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52. Bosn. & Herz. v. Serb. & Montenegro, 2007 I.C.J. at 111–13.

53. *Id.* at 113 (highlighting that the Court used this conclusion, in part, to support its view that there existed, implicitly, an obligation upon the State itself not to commit acts of genocide, declaring "[i]t would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law").

54. *Id.* at 221.

55. *Id.*; see also *Yearbook of the U.N. International Law Commission, 2001*, *supra* note 45, at 59 ("The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs. . . .").

56. CAH Articles, *supra* note 3, at 13, art. 3(2).

committed in time of armed conflict.”<sup>57</sup> The Commission then addressed in greater depth the content of this second obligation through other obligations set forth in the 2019 CAH Articles, to which I now turn.

*C. Obligation #3: States Shall Take Legislative or Other Measures to Prevent Atrocities*

The third obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall take legislative or other measures that assist in preventing crimes against humanity in any territory under its jurisdiction.<sup>58</sup>

Article 2, paragraph 1, of the 1984 Torture Convention, which provides: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>59</sup> In commenting on this provision, the Committee against Torture has stated:

States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee’s concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.<sup>60</sup>

As to the specific types of measures that shall be pursued by a State, in 2015 the Human Rights Council adopted a resolution on the prevention of genocide<sup>61</sup> that provides some insights into the kinds of measures that are expected in fulfilment of Article I of the 1948 Genocide Convention. Among other things, the resolution: (a) reiterated “the responsibility of each individual State to protect its population from genocide, which entails the prevention of such a crime, including incitement to it, through appropriate and necessary means;”<sup>62</sup>

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57. *Id.*

58. *Id.* at 13, art. 4.

59. Convention Against Torture, *supra* note 16, art. 2(1).

60. See Committee Against Torture, U.N. Doc. CAT/C/GC/2, ¶ 4 (Jan. 24, 2008).

61. Rep. of the Human Rights Council, U.N. Doc. A/70/53, at 20 (2015).

62. *Id.* at 22.

(b) encouraged “Member States to build their capacity to prevent genocide through the development of individual expertise and the creation of appropriate offices within Governments to strengthen the work on prevention;”<sup>63</sup> and (c) encouraged “States to consider the appointment of focal points on the prevention of genocide, who could cooperate and exchange information and best practices among themselves and with the Special Adviser to the Secretary-General on the Prevention of Genocide, relevant United Nations bodies and with regional and sub-regional mechanisms.”<sup>64</sup>

In the regional context, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)<sup>65</sup> contains no express obligation to “prevent” violations of the Convention,<sup>66</sup> but the European Court of Human Rights has construed Article 2, paragraph 1 (on the right to life), to contain a positive obligation on States parties to safeguard the lives of those within their jurisdiction, consisting of two aspects: (a) the duty to provide a regulatory framework and (b) the obligation to take preventive measures.<sup>67</sup> At the same time, the Court has recognized that the State party’s obligation in this regard is limited.<sup>68</sup> The Court has similarly held that States parties have an obligation, pursuant to article 3 of the Convention to prevent torture and other forms of ill-treatment.<sup>69</sup>

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63. *Id.*

64. *Id.* at 22-23.

65. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

66. *See id.*

67. Makaratzis v. Greece, 2004-XI Eur. Ct. H.R. 195, ¶ 57. *See also* Kiliç v. Turkey, 2000-III Eur. Ct. H.R. 128, ¶ 62 (finding that article 2, paragraph 1, obliged a State party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction); Valentin Câmpeanu v. Romania, 2014 Eur. Ct. H.R. 222, ¶ 130.

68. Mahmut Kaya v. Turkey, 2000-III Eur. Ct. H.R. 149, ¶ 86 (“Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2, paragraph 1,] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.”). *See also* Kerimova v. Russia, Application Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Eur. Ct. H.R., Final Judgment, ¶ 246 (2011); Osman v. the United Kingdom, 1998-VIII Eur. Ct. H.R. 101, ¶ 116.

69. A v. United Kingdom, 1998-VI Eur. Ct. H.R. 85, ¶ 22; *see also* O’Keeffe v. Ireland, 2014 Eur. Ct. H.R. 173, ¶ 144.

Likewise, although the 1969 American Convention on Human Rights<sup>70</sup> contains no express obligation to “prevent” violations of the Convention, the Inter-American Court of Human Rights, when construing the obligation of the States parties to “ensure” the free and full exercise of the rights recognized by the Convention,<sup>71</sup> has found that this obligation implies a “duty to prevent,” which in turn requires the State party to pursue certain steps.<sup>72</sup> The Court has said:

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.<sup>73</sup>

Similar reasoning has animated the Court’s approach to the interpretation of article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture.<sup>74</sup>

To capture this third obligation for the 2019 CAH Articles, the Commission adopted Article 4, subparagraph (a), which provides that: “Each State undertakes to prevent crimes against humanity, in conformity with international law, through: (a) effective legislative, administrative, judicial or other appropriate preventive measures in any

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70. American Convention on Human Rights: “Pact of San José, Costa Rica” (Nov. 22, 1969), O.A.S.T.S. No. 17955, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].
71. *Id.* art. 1(1) (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination.”). *See also* African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217 (providing that the States parties “shall recognise the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them”).
72. Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 175 (Jul. 29, 1988). *See also* Gómez-Paquiyaui Brothers v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 155 (Jul. 8, 2004); Juan Humberto Sánchez v. Honduras, Preliminary Objections, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶¶ 137, 142 (June 7, 2003).
73. Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 175 (Jul. 29, 1988).
74. Tibi v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 159 (Sept. 7, 2004). *See also* Gómez-Paquiyaui Brothers v. Peru, Reparations and Costs Judgment Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 155 (Jul. 8, 2004).



territory under its jurisdiction; ....”<sup>75</sup> The term other “preventive measures” rather than just other “measures” was used by the Commission to reinforce the point that the measures at issue in subparagraph (a) relate solely to those aimed at prevention.<sup>76</sup> The term “appropriate” offers some flexibility to each State when implementing this obligation, allowing it to tailor other preventive measures to the circumstances faced by that particular State. The term “effective” implies that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective measures. Thus, the specific preventive measures that any given State shall pursue with respect to crimes against humanity will depend on the context and risks at issue for that State with respect to these offences. Such an obligation usually would oblige the State at least to:

- adopt national laws and policies as necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission;
- continually keep those laws and policies under review and as necessary improve them;
- pursue initiatives that educate governmental officials as to the State’s obligations under the 2019 articles; and
- implement training programs for police, military, militia and other relevant personnel as necessary to help prevent the commission of crimes against humanity.<sup>77</sup>

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75. CAH Articles, *supra* note 3, at 13, art. 4(a).

76. *Id.*

77. For comparable measures with respect to prevention of specific types of human rights violations, see Rep. of the Comm. on the Elimination of Discrimination Against Women, ¶ 770, U.N. Doc. A/43/38 (1988) (containing General Recommendation No. 6 on effective national machinery and publicity); Rep. of the Comm. on the Elimination of Discrimination Against Women, ¶ 438, U.N. Doc. A/45/38 (1990) (containing General Recommendation No. 15 on the avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome); Rep. of the Comm. on the Elimination of Discrimination Against Women, ¶ 9, U.N. Doc. A/47/38 (1993) (containing General Recommendation No. 19 on violence against women); Rep. of the Comm. on the Rights of the Child, U.N. Doc. A/59/41, annex XI (2003) (containing General Comment No. 5 on general measures of implementation of the convention); Rep. of the Human Rights Comm., U.N. Doc. No. A/59/40 (Vol. I), annex III (2004) (containing General Comment No. 31 on the nature of the general legal obligation imposed on states parties to the covenant); Rep. of the Comm. on the Rights of the Child, U.N. Doc. A/61/41, annex II (2005) (containing General Comment No. 6 on the treatment of unaccompanied and

Of course, some measures, such as training programs, may already exist in the State to help prevent wrongful acts (such as war crimes, murder, torture, or rape) that relate to crimes against humanity.<sup>78</sup> If so, the State is obliged to supplement those measures, as necessary, specifically to prevent crimes against humanity.

*D. Obligation #4: States Shall Cooperate with other States, International Organizations and, as Appropriate, Non-Governmental Organizations for the Prevention of Atrocities*

The fourth obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall cooperate with other States, relevant intergovernmental organizations, and, as appropriate, other organizations, all for the purpose of preventing crimes against humanity.<sup>79</sup>

The duty of States to cooperate in the prevention of crimes against humanity arises, in the first instance, from Article 1, paragraph 3, of the Charter of the United Nations, which indicates that one of the purposes of the Charter is to “achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all”.<sup>80</sup> Further, in Articles 55 and 56 of the

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separated children outside their country of origin); Rep. of the Comm. on the Elimination of Racial Discrimination, ¶ 460, U.N. Doc. A/60/18 (2005) (containing General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system). *See also* G.A. Res. 60/147, annex (Dec. 16, 2005) (stating that the obligation to “respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to . . . [t]ake appropriate legislative and administrative and other appropriate measures to prevent violations”).

78. For example, training or dissemination programs may already exist in relation to international humanitarian law and the need to prevent the commission of war crimes. Common Article 1 to the 1949 Geneva Conventions obliges High Contracting Parties “to respect and ensure respect” for the rules of international humanitarian law, which may have encouraged pursuit of such programs. *See* Int’l Comm. of the Red Cross, *Commentary on the First Geneva Convention*, ¶¶ 145–146, 150, 154, 164, 178 (2016) (discussing common article 1). Further, Article 49 of Geneva Convention I—a provision common to the other Conventions—also imposes obligations to enact legislation to provide effective penal sanctions and to suppress acts contrary to the Convention. *See id.* ¶¶ 2842, 2855, 2896 (discussing article 49). *See generally* Lindsey Cameron et al., *The Updated Commentary on the First Geneva Convention - A New Tool for Generating Respect for International Humanitarian Law*, 97 INT’L R. OF THE RED CROSS 900, 1209–26 (2015).

79. CAH Articles, *supra* note 3, at 13, art. 4(b).

80. U.N. Charter art. 1, ¶ 3.

Charter, all Members of the United Nations pledge “to take joint and separate action in cooperation with the Organization for the achievement of” certain purposes, including “universal respect for, and observance of, human rights and fundamental freedoms for all.”<sup>81</sup>

Specifically, with respect to preventing crimes against humanity, the General Assembly of the United Nations recognized in its 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity.<sup>82</sup> Among other things, the Assembly declared that States shall cooperate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.<sup>83</sup>

Further, I note that the Commission’s 2001 Articles on the Responsibility of States for Internationally Wrongful Acts provides that “States shall cooperate to bring to an end through lawful means any serious breach” by a State “of an obligation arising under a peremptory norm of general international law.”<sup>84</sup>

To capture this fourth obligation for the 2019 CAH Articles, the Commission adopted Article 4, subparagraph (b), which provides that: “Each State undertakes to prevent crimes against humanity, in conformity with international law, through: ... (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.”<sup>85</sup> The term “relevant” is intended to indicate that cooperation with any particular intergovernmental organization will depend, among other things, on the organization’s functions and mandate, on the legal relationship of the State to that organization, and on the context in which the need for cooperation arises.<sup>86</sup> Further, subparagraph (b) provides that States shall cooperate, as appropriate, with other organizations, such as the components of the International Red Cross and Red Crescent Movement, within the limits of their respective mandates.<sup>87</sup> These organizations include non-governmental organizations that could play an important role in the

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81. U.N. Charter arts. 55–56.

82. G.A. Res. 3074 (XXVIII), ¶¶ 3, 7 (Dec. 3, 1973).

83. *Id.* ¶ 3.

84. *Yearbook of the U.N. International Law Commission, 2001*, *supra* note 45, at 29.

85. CAH Articles, *supra* note 3, at 13, art. 4(b).

86. CAH Articles, *supra* note 3, at 61.

87. CAH Articles, *supra* note 3, at 13, art. 4(b).

prevention of crimes against humanity in specific countries.<sup>88</sup> The term “as appropriate” is used to indicate that the obligation of cooperation, in addition to being contextual in nature, does not extend to these organizations to the same extent as it does to States and relevant intergovernmental organizations.<sup>89</sup>

*E. Obligation #5: States Shall Not Send a Person to a Place Where the Person Would be in Danger of Being Subjected to an Atrocity*

The fifth obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall not send a person to another State where he or she might become the victim of crimes against humanity.<sup>90</sup>

As is well-known, the principle of *non-refoulement* obligates a State not to return or otherwise transfer a person to another State where there are substantial grounds for believing that he or she will be in danger of persecution or some other specified harm.<sup>91</sup> That principle was incorporated in various treaties during the twentieth century, including the 1949 Fourth Geneva Convention,<sup>92</sup> but is most commonly associated with international refugee law and, in particular, article 33 of the 1951 Convention relating to the Status of Refugees (1951 Refugees Convention).<sup>93</sup> Other conventions and instruments<sup>94</sup> addressing refugees have incorporated the principle, such as the 1969

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88. CAH Articles, *supra* note 3, at 61.

89. *Id.*

90. CAH Articles, *supra* note 3, at 13, art. 5(1).

91. *Id.* at 62.

92. Geneva Convention IV art. 45, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. See Int’l Comm. of the Red Cross, *Commentary on the First Geneva Convention*, ¶¶ 706–718 (2016) (discussing how common article 3 implicitly includes a *non-refoulement* obligation).

93. Convention Relating to the Status of Refugees art. 33, ¶ 1, July 28, 1951, 189 U.N.T.S. 2545 (“No Contracting State shall expel or return (‘*refouler*’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

94. See, e.g., Cartagena Declaration on Refugees, § 3, ¶ 5, Nov. 22, 1984 (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama), *available at* <https://www.unhcr.org/en-us/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html> [https://perma.cc/MV9Y-F4SP].

Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>95</sup>

The principle also has been applied with respect to all aliens (not just refugees) in various instruments<sup>96</sup> and treaties, such as the 1969 American Convention on Human Rights<sup>97</sup> and the 1981 African Charter on Human and Peoples' Rights.<sup>98</sup> Indeed, the principle was addressed in this broader sense in the Commission's 2014 Articles on the Expulsion of Aliens.<sup>99</sup> The Human Rights Committee and the European Court of Human Rights have construed the prohibition against torture or cruel, inhuman or degrading treatment, contained in Article 7 of the 1966 International Covenant on Civil and Political Rights<sup>100</sup> and Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms<sup>101</sup> respectively, as implicitly imposing an obligation of *non-refoulement* even though these conventions contain no such express obligation.<sup>102</sup> Further, the principle of *non-refoulement* is often reflected in extradition treaties, by stating that nothing in the treaty shall be interpreted as imposing an obligation to extradite an

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95. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art. 2, Sept. 10, 1969, 1001 U.N.T.S. 45.
96. See, e.g., G.A. Res. 2312 (XXII), art. 3 (Dec. 14, 1967); Eur. Consult. Ass., Recommendation No. R (84) 1 of the Committee of Ministers to Member States on the Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised as Refugees, 336th Sess., Doc. No. 195 (1984).
97. American Convention on Human Rights, *supra* note 70, art. 22, ¶ 8.
98. African Charter on Human and Peoples' Rights art. 12, ¶ 3, June 27, 1981, 1520 U.N.T.S. 217.
99. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session art. 23, U.N. Doc. A/69/10 (2014) ("No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.").
100. Human Rights Comm., *General Comment 20: Article 7*, ¶ 9 (1992), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, at 30 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.").
101. *Chahal v. The United Kingdom*, App. No. 22414/93, 23 Eur. Ct. H.R. Rep. 413 (1996).
102. *General Comment 20: Article 7*, *supra* note 100, ¶ 9. See also David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1 (1999).

alleged offender if the requested State party has substantial grounds for believing the request has been made to persecute the alleged offender on specified grounds.<sup>103</sup>

Of particular relevance for the 2019 CAH Articles, the principle has been incorporated in treaties addressing specific crimes, such as torture and enforced disappearance. For example, Article 3 of the 1984 Torture Convention was modelled on the 1951 Refugees Convention, but added the additional element of “extradition” to cover another possible means by which a person is physically transferred to another State.<sup>104</sup> Article 16 of the 2006 Enforced Disappearance Convention formulates the rule as follows:

1. No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.<sup>105</sup>

The “substantial grounds” standard used in such treaties has been addressed by various expert treaty bodies and by international courts.<sup>106</sup> For example, the Committee against Torture, in considering communications alleging that a State has violated Article 3 of the 1984 Torture Convention, has stated that “substantial grounds” exist whenever the risk of torture is “foreseeable, personal, present, and

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103. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

104. *Id.*; *see also* Refugees and Stateless Persons art. 33, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

105. International Convention for the Protection of All Persons from Enforced Disappearance art. 16, Dec. 20, 2006, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010).

106. Comm. Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, U.N. Doc. CAT/C/GC/4, at 2 (Sept. 4, 2018) [hereinafter Comm. Against Torture, *General Comment No. 4*]; *see also* Dadar v. Canada, Comm. Against Torture, No. 258/2004, ¶ 8.4, U.N. Doc. CAT/C/35/D/258/2004 (Dec. 5, 2005) (outlining relevant communications); G.A. Dec. 356/2008, U.N. Doc A/65/44, at 329 (May 6, 2010).

real.”<sup>107</sup> It has also explained that each person’s “case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards.”<sup>108</sup>

In guidance to States, the Human Rights Committee has indicated that a State has an obligation “not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.”<sup>109</sup> In interpreting this standard, the Human Rights Committee has concluded that States must refrain from exposing individuals to a real risk of violations of their rights under the Covenant, as a “necessary and foreseeable consequence” of expulsion.<sup>110</sup> It has further maintained that the existence of such a real risk must be decided “in the light of the information that was known, or ought to have been known” to the State party’s authorities at the time and does not require “proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk.”<sup>111</sup>

The European Court of Human Rights has found that a State’s obligation is engaged where there are substantial grounds for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>112</sup> In applying this legal test, States must examine the “foreseeable consequences” of sending an individual to the receiving country.<sup>113</sup> While a “mere possibility” of ill-

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107. Comm. Against Torture, *General Comment No. 4*, *supra* note 106, ¶ 11.

108. *Id.* ¶ 13.

109. Human Rights Comm., General Comment No. 31, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

110. *See, e.g.*, Chitat Ng v. Canada, Human Rights Comm., No. 469/1991, ¶ 15.1(a), U.N. Doc A/49/40 (Sept. 25, 1991); A.R.J. v. Australia, Human Rights Comm., No. 629/1996, ¶ 6.14, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997); Hamida v. Canada, Human Rights Comm., No. 1544/2007, ¶ 8.7, U.N. Doc. CCPR/C/98/D/1544/2007 (May 11, 2010).

111. *See, e.g.*, Maksudov, Rakhimov, Tashbaev, and Pirmatov v. Kyrgyzstan, Human Rights Comm., Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, ¶ 12.4, U.N. Docs. CCPR/C/93/D/1461, 1462, 1476 & 1477/2006 (July 31, 2008).

112. *See, e.g.*, Soering v. United Kingdom, 14038 Eur. Ct. H.R. 88, ¶ 88 (1989); Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. Ct. H.R. 413 (1996).

113. Saadi v. Italy, 37201 Eur. Ct. H.R. 6, ¶ 130 (2008).

treatment is not sufficient, it is not necessary, according to the European Court, to show that subjection to ill-treatment is “more likely than not.”<sup>114</sup> The European Court has stressed that the examination of evidence of a real risk must be “rigorous.”<sup>115</sup> Further, and similarly to the Human Rights Committee, the evidence of the risk “must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion,”<sup>116</sup> though regard can be had to information that comes to light subsequently.<sup>117</sup>

Contemporary formulations of the *non-refoulement* principle (such as appears in the 2006 Enforced Disappearance Convention<sup>118</sup>) contain a second paragraph providing that States shall take into account “all relevant considerations” when determining whether there are substantial grounds for the purposes of paragraph 1.<sup>119</sup> Such considerations include, but are not limited to, “the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.”<sup>120</sup> Indeed, various considerations may be relevant. When interpreting the 1966 International Covenant on Civil and Political Rights, the Human Rights Committee has stated that all relevant factors should be considered,<sup>121</sup> and that “[t]he existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed.”<sup>122</sup> The Committee against Torture has developed, for the purposes of the 1984 Torture Convention, a detailed list of “non-exhaustive examples of human rights situations that may constitute an indication of risk of torture, to which [States parties] should give consideration in their decisions on the removal of a person

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114. *Id.* at. ¶¶ 131, 140.

115. *Id.* at. ¶ 128.

116. *Id.* at. ¶ 133.

117. *See, e.g.,* El-Masri v. the former Yugoslav Republic of Macedonia, 39630 Eur. Ct. H.R. 9, ¶ 214 (2012).

118. *See, e.g.,* International Convention for the Protection of All Persons from Enforced Disappearance art. 16, Dec. 20, 2006, 2716 U.N.T.S. 48088 (entered into force Dec. 23, 2010).

119. *See, e.g., id.*

120. *Id.*

121. Mohammed Alzery v. Sweden, Human Rights Comm., No. 1416/2005, ¶ 11.3, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).

122. *Id.*



from their territory and take into account when applying the principle of ‘non-refoulement.’”<sup>123</sup>

When considering whether it is appropriate for States to rely on assurances made by other States,<sup>124</sup> the European Court of Human Rights considers such factors as whether the assurances are specific or are general and vague,<sup>125</sup> whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms,<sup>126</sup> and whether there is an effective system of protection against the violation in the receiving State.<sup>127</sup>

To capture this fourth obligation for the 2019 CAH Articles, the Commission adopted Article 5, which provides:

1. No State shall expel, return (*refouler*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass

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123. Comm. Against Torture, *General Comment No. 4*, *supra* note 106, ¶ 29.

124. *Id.* ¶ 20. (“The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.”).

125. *Saadi v. Italy*, 37201 Eur. Ct. H.R. 6, ¶¶ 147–148 (2008).

126. *See, e.g.*, *Chentiev and Ibragimov v. Slovakia*, Nos. 21022/08 & 51946/08 (Sept. 14, 2010), *available at* <http://hudoc.echr.coe.int/eng?i=001-100935> [<https://perma.cc/43CW-6KAL>].

127. *See, e.g.*, *Soldatenko v. Ukraine*, No. 2440/07, ¶ 73 (Jan. 23, 2009), *available at* <http://hudoc.echr.coe.int/eng?i=001-89161> [<https://perma.cc/N464-H9JJ>]; *Othman (Abu Qatada) v. United Kingdom*, No. 8139/09, ¶ 189 (May 9, 2012), *available at* <http://hudoc.echr.coe.int/eng?i=001-108629> [<https://perma.cc/6564-2G9F>] (explaining that other factors that Court might consider include: whether the terms of assurances are disclosed to the Court; who has given assurances and whether those assurances can bind the receiving State; if the assurances were issued by the central government of a State, whether local authorities can be expected to abide by such assurances; whether the assurances concern treatment which is legal or illegal in the receiving State; the length and strength of bilateral relations between the sending and receiving States; whether the individual has been previously ill-treated in the receiving State; and whether the reliability of the assurances has been examined by the domestic courts of the sending State).

violations of human rights or of serious violations of international humanitarian law.<sup>128</sup>

While, as in earlier conventions, the State's obligation under 2019 CAH Article 5, paragraph 1, is focused on avoiding exposure of a person to crimes against humanity, this obligation is without prejudice to other obligations of *non-refoulement* arising from treaties or customary international law. Indeed, the obligations of States contained in all relevant treaties continue to apply in accordance with their terms.

*F. Obligation #6: States Shall Punish Atrocities as a Means of Prevention*

The sixth obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall punish crimes against humanity.

The International Court of Justice noted that the duty to punish, in the context of the 1948 Genocide Convention, is connected to (but distinct from) the duty to prevent.<sup>129</sup> While it said that "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent,"<sup>130</sup> the Court found that "the duty to prevent genocide and the duty to punish its perpetrators . . . are . . . two distinct yet connected obligations."<sup>131</sup> Further, the "obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty."<sup>132</sup>

To capture this sixth obligation for the 2019 CAH Articles, the Commission first adopted Article 3, paragraph 2.<sup>133</sup> That paragraph reads in part: "Each State undertakes ... to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict."<sup>134</sup> The Commission then addressed in greater depth the content of this sixth obligation through other obligations set forth in the 2019 CAH Articles, beginning with Article 6, which sets forth various measures that each State must take under its criminal law: to ensure that crimes against humanity constitute offences; to preclude certain defenses or any statute of

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128. 2019 CAH Articles, *supra* note 3, at 13, art. 5.

129. *See generally* Bosn. & Herz. v. Serb. & Mont., 2007 I.C.J. Rep. 43.

130. *Id.* at 219, ¶ 426.

131. *Id.* at 219, ¶ 425.

132. *Id.* at 219–20, ¶ 427.

133. CAH Articles, *supra* note 3, at 13.

134. *Id.*

limitation; and to provide for appropriate penalties commensurate with the grave nature of such crimes.<sup>135</sup> Measures of this kind are essential for the proper functioning of further provisions of the 2019 CAH Articles, which relate to the establishment and exercise of criminal jurisdiction over alleged offenders.

## V. ALL MEASURES OF PREVENTION MUST BE CONSISTENT WITH INTERNATIONAL LAW

One important issue concerns whether such obligations of prevention might be seen as having any effect on international rules concerning the non-use of force or non-intervention, such as appear in the U.N. Charter.<sup>136</sup> The International Court of Justice importantly stated in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* that, when engaging in measures of prevention, “it is clear that every State may only act within the limits permitted by international law.”<sup>137</sup>

In crafting the 2019 CAH Articles, the Commission deemed it important to express that requirement both in the preamble and in the draft articles themselves.<sup>138</sup> Thus, in the preamble, the Commission included a paragraph: “*Recalling* the principles of international law embodied in the Charter of the United Nations,”<sup>139</sup> while in the chapeau of draft Article 4 on “Obligation of prevention,” it included a clause indicating that any measures of prevention must be “in conformity with international law.”<sup>140</sup> As such, any measures undertaken by a State to fulfill its obligation to prevent crimes against humanity must be consistent with the rules of international law, including rules on the use of force set forth in the U.N. Charter, international humanitarian law, and human rights law.<sup>141</sup> In short, the State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity.

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135. *Id.* at 13–14.

136. *Id.* at 57.

137. *Bosn. & Herz. v. Serb.*, 2007 I.C.J. Rep. at 221, ¶ 430.

138. CAH Articles, *supra* note 3, at 11, 13 (laying out the obligation of prevention in both the preamble and article 4).

139. *Id.* at 11, preamble.

140. *Id.* at 13, art. 4.

141. *See id.* at 57.

## VI. DO SUCH TREATY PROVISIONS ACTUALLY WORK TO PREVENT ATROCITIES?

I will conclude by noting that, in recent years, several commentators have questioned the effectiveness of multilateral treaties, especially human rights instruments, with some even attempting to test empirically whether adherence to human rights instruments has truly altered State compliance with human rights.<sup>142</sup> Others have responded by pointing to various ways that such treaties might influence States and to deficiencies in the methods and assumptions being used to test causal effects.<sup>143</sup>

In this brief address, I cannot do justice to such studies, but I would like to indicate reasons why major multilateral treaties containing obligations relating to prevention of atrocities or other wrongs are likely helpful in reducing such harms. First, incorporating such obligations in a major multilateral treaty does have the effect of stigmatizing the wrong in a highly public way. States and the bureaucracies in which they operate, spend a significant amount of time seeing a treaty through its negotiation and adoption phases, and then often engage deeply with more local constituencies for the ratification and implementation phases.<sup>144</sup> While it might seem that crimes against humanity are already sufficiently stigmatized such that actions of this kind are not necessary, in fact the concept of such crimes, in my experience, is not well-understood (for example, how they differ from genocide or war crimes), including the fact that they can be committed by non-State actors and in time of peace, and can consist of a range of actions other than just murder or extermination. Raising awareness through the vehicle of major multilateral treaties has the effect of “socializing” not just governments but other relevant actors, and indeed the average person, in a manner that would appear to serve preventive purposes.<sup>145</sup>

Second, the overall thrust of most multilateral treaties (those setting up international courts or tribunals being an important exception) containing obligations relating to prevention of atrocities or other wrongs is to alter *national* laws, regulations, and policies. In so doing, the treaty harnesses the power of the national legal system,

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142. See, e.g., Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

143. See Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT'L L. 277 (2017); Katerina Linos & Tom Pegram, *What Works in Human Rights Institutions?*, 111 AM. J. INT'L L. 628 (2017); Valentina Carraro, *Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies*, 63 INT'L STUD. Q. 1079 (2019).

144. See, e.g., BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

145. See, e.g., RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013).

including national courts, in a manner that would appear to make the implementation and enforcement of preventive measures more likely.

Third, an important further element of most multilateral treaties containing obligations relating to prevention of atrocities or other wrongs is to provide a legal framework for inter-State cooperation and cooperation of States with international organizations. In doing so, the treaty harnesses the power of the global “community”, opening up opportunities for cooperative efforts to detect the possible outbreaks of atrocities and to respond to them when necessary and possible.

Ultimately, we may never succeed in preventing all atrocities, any more than laws on murder over the centuries have prevented homicides today. But if one views law as a means for channeling power into a rules-based system, the more legal techniques we exploit in the international realm for doing so, the better off the world will be.

## APPENDIX

Table of Provisions Relating to Prevention Found within the ILC 2019 Articles on Prevention and Punishment of Crimes against Humanity, With Examples of Comparable Provisions Found in Earlier Treaties

<i><b>General Obligations and Obligations to Take Preventive Measures and to Cooperate</b></i>
<b>2019 ILC Article 3: General obligations</b>  1. Each State has the obligation not to engage in acts that constitute crimes against humanity. 2. Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict. 3. No exceptional circumstances, whatsoever, such as armed conflict, internal political stability or other public emergency, may be invoked as a justification of crimes against humanity.
<b>2019 ILC Article 4: Obligation of prevention</b>  Each State undertakes to prevent crimes against humanity, in conformity with international law, through:  (a) effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction; and  (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

<p>1948 Convention on the Prevention and Punishment of the Crime of Genocide  (149 States Parties)</p>	<p>Article I</p> <p>The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.</p> <p>Article V</p> <p>The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.</p> <p>Article VIII</p> <p>Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.</p>
<p>1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation  (188 States Parties)</p>	<p>Article 10</p> <p>1. Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1.</p>
<p>1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents</p>	<p>Article 4</p> <p>States Parties shall cooperate in the prevention of the crimes set forth in article 2, particularly by:</p> <p>(a) taking all practicable measures to prevent preparations in their respective</p>

(180 States Parties)	territories for the commission of those crimes within or outside their territories [. . .].
1973 International Convention on the Suppression and Punishment of the Crime of Apartheid  (109 States Parties)	Article IV  States Parties to the present Convention undertake [. . .]:  (a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime.
1979 International Convention against the Taking of Hostages  (176 States Parties)	Article 4  States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by:  (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages [. . .]
1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment  (165 States Parties)	Article 2  1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
1985 Inter-American Convention to Prevent and Punish Torture	Article 1  The State Parties undertake to prevent and punish torture in accordance with terms of this Convention.

(18 States Parties)	<p>Article 6</p> <p>In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.</p> <p>The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.</p> <p>The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.</p>
<p>1994 Convention on the Safety of United Nations and Associated Personnel</p> <p>(94 States Parties)</p>	<p>Article 11</p> <p>States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by:</p> <p>(a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories [. . .]</p>
<p>1994 Inter-American Convention on Forced Disappearance of Persons</p> <p>(15 States Parties)</p>	<p>Article 1</p> <p>The States Parties to this Convention undertake:</p> <p>(c) to cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons;</p> <p>(d) to take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.</p>



<p>1997 International Convention for the Suppression of Terrorist Bombings  (170 States Parties)</p>	<p>Article 15</p> <p>States Parties shall cooperate in the prevention of the offences set forth in article 2.</p>
<p>2000 United Nations Convention against Transnational Organized Crime  (189 States Parties)</p>	<p>Article 9</p> <p>1. In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.</p> <p>2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.</p> <p>Article 29</p> <p>1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention.</p> <p>Article 31</p> <p>1. States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime.</p>

<p>2000 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime</p> <p>(173 States Parties)</p>	<p>Article 9</p> <p>1. States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization.</p>
<p>2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</p> <p>(88 States Parties)</p>	<p>Preamble</p> <p><i>Recalling</i> that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures.</p> <p>Article 3</p> <p>Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.</p>
<p>2006 International Convention for the Protection of All Persons from Enforced Disappearance</p> <p>(59 States Parties)</p>	<p>Article 23</p> <p>1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c)</p>

	<p>Ensure that the urgent need to resolve cases of enforced disappearance is recognized.</p> <p>2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.</p> <p>3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.</p>
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<i>Non-refoulement</i>	
<b>2019 ILC Article 5: Non-refoulement</b>	
<p>1. No State shall expel, return (<i>refouler</i>), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.</p> <p>2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.</p>	
1951 Convention relating to the Status of Refugees  (145 States Parties)	<p>Article 33</p> <p>1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.</p>

	<p>2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.</p>
<p>1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment  (165 States Parties)</p>	<p>Article 3</p> <p>1. No State Party shall expel, return (<i>refouler</i>) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.</p> <p>2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant consideration, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.</p>
<p>2006 International Convention for the Protection of All Persons from Enforced Disappearance  (59 States Parties)</p>	<p>Article 16</p> <p>1. No State Party shall expel, return (“<i>refouler</i>”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.</p> <p>2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.</p>

<i><b>Criminalization under National Law</b></i>	
<b>2019 ILC Article 6: Criminalization under national law</b>	
<p>1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.</p> <p>2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:</p> <p>(a) committing a crime against humanity;</p> <p>(b) attempting to commit such a crime; and</p> <p>(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.</p>	
<p>1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment</p> <p>(165 States Parties)</p>	<p>Article 4</p> <p>1. Each State party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.</p>
<p>1998 Rome Statute of the International Criminal Court</p> <p>(123 States Parties)</p>	<p>Article 25</p> <p>3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:</p> <p>(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;</p> <p>(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;</p> <p>(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;</p>

	<p>(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:</p> <p>(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or</p> <p>(ii) Be made in the knowledge of the intention of the group to commit the crime;</p> <p>(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;</p> <p>(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.</p>
<p>2006 International Convention for the Protection of All Persons from Enforced Disappearance</p> <p>(59 States Parties)</p>	<p>Article 4</p> <p>Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.</p> <p>Article 6</p> <p>1. Each State Party shall take the necessary measures to hold criminally responsible at least:</p> <p>(a) Any person who commits, orders, solicits or induces the commission of, attempts to</p>

	commit, is an accomplice to or participates in an enforced disappearance; [. . .]
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